

COMMISSIONERS APPROVAL

ROKOSCH *JRM*

GRANDSTAFF *CS*

THOMPSON *AT*

CHILCOTT *J*

DRISCOLL *KO*

Date.....July 31, 2007

Members Present.....Commissioner Jim Rokosch,
Commissioner Carlotta Grandstaff, Commissioner Alan Thompson, Commissioner Greg
Chilcott and Commissioner Kathleen Driscoll

Minutes: Glenda Wiles

The Board met to discuss and make a decision on filing a petition (lawsuit) in District Court against the Board of Adjustment for their decision of the variance request for the Brooks Hotel. There were numerous citizens present for this discussion as well as County Attorney George Corn and Planner Shaun Morrell. Commissioner Rokosch gave some background on the Brooks Hotel. He noted it had a preliminary conference meeting with the Planning Staff and was subject to the interim zoning regulations. A variance request was made and heard before the Board of Adjustment on June 25th. He indicated the Commissioners just received a draft of the Board of Adjustment meetings and were reviewing them. Commissioner Rokosch stated the pertinent issues for the Commissioners are the criteria the Board of Adjustments needed to review (nine of them). The Planning Staff recommended a negative determination of four of the nine criteria. The Commissioners have received communication from the Bitterrooters for Planning which addressed the positives of the Planning Staff report. Commissioner Rokosch asked the Commissioners to focus on the criteria of the negative findings, and as which the Board of Adjustment found a positive finding on those same criteria.

Commissioner Chilcott stated the agenda shows filing a petition in district court and not the criteria. He stated it is 'easy to sit and judge the quarterback', but not really fair to do so. Commissioner Rokosch stated he was simply trying to provide the background for their decision and whether they have grounds to pursue such action. Commissioner Rokosch stated the four criteria that were recommended to be negative, the Board of Adjustments found a positive. He stated these findings must be found in conclusions of law and findings of fact.

George stated there is no bar of measurement here; and it is up to the Commissioners with the authority of Montana Law that allows them to pursue a petition. There is a

procedure that allows this to go to District Court; sometimes a referee is appointed to make a decision. It is done by petition, and not like a traditional law suit.

Commissioner Grandstaff asked to review the four criteria.

- A) Variance consistent with interim zoning regulations and conforms to following stipulations. (From staff: negative)
- B) Strict applications would provide hardship to applicant. (From staff: negative)
- C) The variance is minimum deviation that will alleviate hardship and allow reasonable return on property. (From staff: negative)
- D) Circumstances not of applicants own making.
- E) Not peculiar to district. (From staff: negative)
- F) The variance will not alter the character of the area or adversely affects the public health
- G) The variance will not place the subdivisions out of conformation from plan
- H) The variance will not contribute to emergency of Ravalli County
- I) The variance is in the public interest

Planning had five positive and four negative out of the nine criteria. A positive finding shows they passed the 'muster test'.

Commissioner Rokosch asked the Commissioners to focus on the negative findings. He stated they need to see if the law was followed and criterion was found in regard to the findings of fact and conclusions of law that supported the Board of Adjustment action.

Commissioner Rokosch called for public comment.

Russ Hunt owner of Brooks Hotel asked how this got back on the agenda. Commissioner Rokosch stated it was his decision and he spoke with Civil Counsel Alex Beal about the procedure and wanted to make sure the procedures followed the law. In one collective session with Alex the Commissioners considered appealing this decision, then they received formal communication from Bitterrooters for Planning stating their concerns.

Russ asked if the Commissioners have to follow their request. Commissioner Rokosch stated no, it was his decision after meeting with Civil Counsel and the other Commissioners.

Russ asked for examples of the requirements that did not pass the Planning Board. He stated this criterion was made so that no piece of ground would fit or pass. Commissioner Rokosch stated that is Russ's opinion, and in regard to the the hardship criteria; each specific parcel in regard to the variance would have to be considered in regard to the layout. It is not a fair statement to say there is no property that would have a hardship. In regard to minimum deviation that is an argument that could have been made, as the proposal could have been altered in order to provide less of a deviation.

Russ stated he took Shaun's advice and went for the major deviation. Commissioner Rokosch stated there could be properties that can meet the criteria. Commissioner Rokosch stated he has no other proposals in front of the Commissioners at this time.

Commissioner Driscoll stated in this case there were four return negatives on the property. If there had been one we would judge it differently. With four criteria it makes us take pause. She stated she wants to see what has happened here.

Russ stated this process took him several months. He followed the process that was requested of him, and asked how the Chairman could 'just make a decision' that might create something difficult for him. Commissioner Rokosch stated the Commissioners have a responsibility to make sure the law is followed. Russ stated he did follow the law. Commissioner Rokosch agreed Russ followed the law, the question is whether the Board of Adjustments followed the law and applied the criteria not in an arbitrary and capricious manner.

Commissioner Driscoll stated it is a matter of a filter system making sure this Board of Adjustments is accountable. She stated the Commissioners have to keep an eye on all of the Boards. In her opinion this looked a little out of line. Commissioner Driscoll stated she understands why Russ feels they might be after him, but it is not personal, it is their relationship with the Board of Adjustments.

Russ stated if the Commissioners are not willing to back up the volunteer boards then nobody will want to serve on the boards.

Commissioner Driscoll stated she understands but it is their responsibility to make sure this Board follows the proper legal process.

Bob Frost stated on January 21, 2000, he sent letter to Rich Weddle a staff attorney for Dept of Commerce. His letter addressed MCA 76-2-206. Rich responded if they follow this statute they can adopt interim zoning. Bob then researched old and new law (citing numerous laws) in regard to the temporary zoning and how the interpretations are made.

Commissioner Rokosch asked the citizens to restrict our public comments to this particular issue.

Engineer John Horat stated he helped prepare the variance criteria. One criterion was the uniqueness. It is located in the Town of Corvallis in dense surroundings. Each property is unique and he understands there is some subjectivity. He asked if the Commissioners are going to trust staff with everything they prepare. He stated there are four criteria that did not make it, so are you going to evaluate each item on its own merit. He asked how George represents two bodies.

Dave Schultz stated he wrote a letter about this Board of Adjustments. He attended the Board of Adjustment meeting and the Board did not seem to have good basis to refute the findings of staff. He stated their decision is not in the best interest of the public and the

Board of Adjustments acted capriciously. They had to be reminded to show their findings and it appeared they did not understand how they derived at their findings. He suggested the Board overthrow their findings.

Doug Sochren was at the Board of Adjustments meeting. He commented at that meeting the planning staff did take their time and found four negatives of the nine, and felt any one negative was worth denying the variance. He stated Board Member Lee Foss acted in an arbitrary and capricious manner. The Board used no facts and it is within the Commissioner's jurisdiction and responsibility to overturn this decision. He recommended they review the Board make up and make sure they put others on this Board. He stated they 'dream up conclusions for their own special interest'.

Attorney Jennifer Lint represents Russ. She stated the Commissioners need to look at all criteria, as that is what the Court will look at. If the Commissioners decide to move forward on a petition, the issue will be turned over to attorneys and Judges, and a decision will not be rendered for a long time. This is an advisory Board. The five criteria they found in a positive manner were the substantive part of their decision. Development was the circumstances of the ordinance and the area. Those are the substances. The other four are intent oriented. She further noted nothing goes along with the '1 for 2'. Criteria # 8 is hard if you read it strictly. She relayed this subdivision is a responsible subdivision and by the time this zoning is in place it will be probably be zoned for this type of subdivision. It is important to look at the whole decision rendered by the Board of Adjustments. She stated the Commissioners better have a case that needs to be brought before a judge, because the minute you file litigation you will lose control. She also stated the Board of Adjustments will ask for representation also.

Attorney Curtis Cook stated he is in support of the Commissioners handling this issue. The statute says the Board of Adjustments may make special exceptions of the terms of zoning in harmony with the general purposes and intent. Thus, make exceptions if necessary. In regard to the decision for the Commissioners, the appeals from the Board of Adjustments to the court of record can be done by petition. Not only can the Commissioners, but any other board that felt they were aggrieved by the Board of Adjustments, would have standing to make an appeal to the court of record. He attended the meeting with the Board of Adjustments and he did not hear anything that sounded reasonable like a finding of fact that would support their decision. They talked about weeds and the purpose of the '1 for 2' to give planning a break in zoning.

Jeni Summers attended the Board of Adjustment meeting. It took them 3 ½ hours to decide this request. It was not done in light. The people on this Board of Adjustments are educated and members of the community. They did not take their job lightly. How does the County sue the County?

Stewart Brandborg spoke on behalf of the Bitterrooters for Planning and stated they submitted a letter of their concerns to the Commissioners. It was his group who initiated the interim zoning and it was not anticipated by many voters that the Board of Adjustments would function until zoning was completed. He felt the Board of

Adjustment appointments was premature, and it was not within our petition campaign. He stated the Board of Adjustment's decision sets a precedent for a decision to be made with a lack of finding of fact. The Bitterrooters for Planning supports legal recourse against the Board and asked the Commissioners to look long and hard at the membership. He stated the Board of Adjustments should represent a broad segment of the public, not a group of people who seem committed to override the interim zoning and open the door to a loss of what our program calls for. He stated their decision subjects the county to a whole host of proposals that cannot be supported.

Lee Foss member of Board of Adjustments stated if the Commissioners are disappointed, the Chairman could move forward on the petition and start the whole process. He advised the Commissioners they have had problems finding people to serve on the volunteer boards. If they continue to question this, they will end up losing board members. As a referee, when you blow the whistle half the crowd stands to applaud, the other half doesn't. He stated the Commissioners are throwing out a message to the public from a brand new board to a brand new board. He stated this matter does not speak well to George Corn. He advised the Commissioners they had Civil Counsel present at our meeting; then you want to sue us?

Public comment was then closed.

Commissioner Rokosch addressed the issue of legal counsel proceeding with an action and if there would be a conflict of interest.

George stated representation is not the same thing for public officials such as a Commissioner and they do not have the same attorney client privilege. Therefore it is not a problem. He stated his office has an obligation to carry out the dictates of Commissioners, plus they provide opinions to certain boards. There are no confidentiality requirements for these political elected offices and boards. The Commissioners have the authority to file the petition, but the question is if they should. He asked the Commissioners to look at the Board of Adjustments performance and see if they did what they were suppose to do. Even if they are dissatisfied with the Board of Adjustments, they need to decide if they want to attack the whole issue. The Board of Adjustments is necessary under the '1 for 2' zoning. He stated abuse of discretion is similar to arbitrary and capricious.

Commissioner Chilcott asked if it is the will of the Commissioner to file a lawsuit against one of their boards. He stated the Commissioners should have the responsibility to provide representation since they appointed them. He asked George if the Commissioners have a legal and ethical responsibility. George stated no to the legal responsibility.

Commissioner Driscoll stated she feels like she wants to go 'baby sit' this board. She stated Russ went through the proper process and she appreciates the spot he is in. She stated the Board of Adjustments comes from a different place than where she comes from on this issue. The question is how they reconcile that perspective. The Commissioners

do not have the last say, this is a judicial board. She asked if the Commissioners can train these boards or help them change their way of processing the variance requests.

George stated all those of things are possible.

Commissioner Rokosch asked how long the process would take if the Commissioners decided to proceed with the petition. George stated the findings were on the 16th of July and there is 30 days to file the petition. His office would need five to six days before that in order to prepare the petition. He would like to have their decision by the 9th of August.

Commissioner Thompson stated he would be opposed to file a suit against this Board because they have several attorneys who all agree to disagree, and most of the decisions rendered by any Board are somewhat subjective. For the last 8 ½ years he has made many decisions with the best counsel and people still file suit. He stated this decision by the Board of Adjustments does not set a precedent, as other board make decisions all the time. This was their first decision, and while he might not necessarily agree with all of their findings or conclusions; it appears they went through everything they needed to do. The Board of County Commissioners has always reviewed the planning staff's recommendations and made changes. We have a brand new board that is feeling their way and this is a unique situation. He stated he is willing to wait until the next meeting the Board of Adjustments has and see how they rule. He stated this was not an easy variance request to hear. He also noted what they are trying to do with zoning is to bring the density into the town areas, which is exactly what was done by granting this variance. He agrees with Jennifer in that over a period of time, the location of this subdivision is exactly what the intent of zoning was to be. At this time he is not in favor of any suit.

Commissioner Grandstaff stated she feels torn about this issue. She does not like the way the Board of Adjustments did their job, but Russ got caught in the middle of this political debate. She stated the issue is what to do about the Board of Adjustments.

Commissioner Rokosch stated while it makes for a political debate, they still need to focus on their legal responsibilities. This Board of County Commissioners and the Board of Adjustments are a quasi judicial board, it is not an advisory board. They should make decisions using the criteria on conclusions of law and findings of fact just as the Commissioners do. We can review the planning staff's findings as salient, and then review the Board of Adjustment findings. He stated they need to see if those findings of fact were supported with due diligence.

Commissioner Grandstaff asked if this case were to go to appeal; who prosecutes who. George stated he would file the petition in District Court against the decision of the Board of Adjustments. The Court will review the findings from the Board of Adjustment. Jennifer stated she would advise Russ to ask for counsel from the county.

George stated in all likelihood the Board of Adjustments might not have to be represented. He agrees with Jennifer in that the Commissioners will then lose control of the issues. The Board of Adjustments is unique in their decisions. You cannot take their

decision and set it as precedence because each project is unique on its own merit. You cannot cite one decision for another.

Commissioner Rokosch stated in regard to liability and exposure, the Commissioners are not the only entity that may or may not bring suit in regard to this decision. He asked if a similar action was taken, and they won the appeal could the Commissioners be liable for those legal fees. George indicated it would work both ways. If the Bitterrooters for Planning sued, they could be awarded fees. He is not sure if Russ were to sue and win, if he would be awarded fees or not.

Commissioner Chilcott stated he appreciates the fact that the interim zoning gave planning some relief in their planning needs. But this is a 'broad brush approach'; this Board of Adjustments is a legal requirement and its members are lay people. They are applying law in a quasi judicial manner and it is difficult to do. He agrees that some day this area in Corvallis will be high density. The Board of Adjustments was trying to do the right thing. He stated the Commissioners have found problems with planning staff's recommendation, and it would be hypocritical for him not to allow the Board of Adjustments to do the same thing. Under criteria A; it would be impossible to allow a variance. These criteria were set up to never allow a variance. He stated if they 'allow this horse to run in district court, we might find some things we don't want to hear'. He stated he questions the motive of the new Commissioner Board Members in regard to this volunteer board membership. He felt litigation is too common and we should not go to our attorneys before we go to the members of our boards. Did we go to the Board of Adjustments and ask them before we went to civil counsel? Commissioner Chilcott felt there are other alternatives to any dissatisfaction they Commissioners might have with their decision to grant this variance.

Commissioner Rokosch stated they are not being hypocritical, because when the Commissioners question staff recommendations they have evidence and facts they are applying. Commissioner Chilcott stated we will have to agree to disagree on this issue. Commissioner Rokosch stated if the other Commissioners took the time to listen to the tape or review the findings of fact, they would find there were substantial differences in the findings of fact.

Commissioner Chilcott stated in regard to the memo of July 25th from George Corn, he knows of no meeting the Commissioners had to request this opinion or decision on today's calendar. He stated if this request (to place this matter on the calendar) was made by a quorum, he would contend it was illegally done. He stated they can not invoke 2-3-203 MCA; to make this request. He further noted he saw nothing in the minutes that discussed how this request was made.

George stated he was asked to research this by Chairman Rokosch and Commissioner Grandstaff. Thus not a quorum to research this issue.

Commissioner Rokosch asked for a motion to proceed with a petition; or they can wait until August 9th to decide. He stated just prior to this meeting, the Commissioners

received the minutes of the Board of Adjustments meeting and there is a CD available so we may listen to the meeting or have it transcribed if necessary.

George stated the transcript of the hearing is necessary. There are services in town that can have this done within 48 hours. Commissioner Rokosch stated it seems appropriate that a full transcript be made. He recommends they re-calender this decision so they can review the transcript.

Commissioner Driscoll indicated she would like to discuss the options available to the Commissioners in making sure the Board of Adjustments has a bigger viewpoint of the issues or training. She stated a different Board of County Commissioners picked this board.

Commissioner Grandstaff stated Commissioner Chilcott indicated there are some alternatives and she would like to know what they are.

Commissioner Chilcott relayed one alternative is to talk to the Board of Adjustments. He stated he has a problem suing a board they appointed.

Commissioner Thompson agreed. Commissioner Grandstaff agreed they need to talk to the Board of Adjustments. Commissioner Driscoll stated they need to look at all the options, with public and board input.

Commissioner Chilcott made a motion to continue this meeting until August 2nd at 0800. Commissioner Grandstaff seconded the motion. Discussion of the motion took place. Commissioner Rokosch asked if the transcript would be done by then. Commissioner Grandstaff and Commissioner Driscoll stated August 3rd is a better day for them. However after further discussion it was agreed to remain with the August 2nd date. Commissioner Grandstaff, Commissioner Driscoll, Commissioner Thompson and Commissioner Chilcott voted "aye". Commissioner Rokosch voted "nay". Motion carried.

Minutes: Beth Farwell

In other business, the Board met with the Montana Department of Transportation (MDOT) for an update, discussion, presentation of access points, data collection for the county and speed limits. Road Supervisor David Ohnstad and MDOT District Administrator Dwayne Kailey, and Planner Renee Van Hoven were present.

Dave gave a brief summary regarding both State and County maintained roads. Dwayne stated he would like to discuss speed limits. He stated the legislature has changed the Highway 93 speed limit to 70 miles per hour (which is not in effect yet). MDOT is currently doing a speed study to either maintain the speed limit at 65 or lower. MDOT does not have the authority to adjust the speed limit. However, the Transportation Commission appointed by the Governor has the authority to change the speed limits. MDOT conducts a study which reviews the corridor, accident records, and road

conditions to make a recommendation to the Transportation Commission for a speed limit. It is the final decision of the Transportation Commission to set the speed limit. It does not have to be based on the MDOT speed study. MDOT can adjust the speed limits in a school zone up to 80%. Discussion followed regarding the posting of speed limits.

MDOT, in cooperation with Montana Highway Control has access to accident reports. They do not open that access to the public for privacy reasons. Dwayne stated requested information can be directed to Pierre Jimney. Commissioner Driscoll questioned the typical turn around time for requested information. Dwayne replied about 1 to 2 weeks.

Commissioner Driscoll asked if Dwayne could give clarification of the accesses permitted on Highway 93. Dwayne replied he has presented a brief overview of systems impact accesses. There are different levels of access control. The Transportation Commission has gone in and adopted limited access control along Highway 93. There are 3 zones for Highway 93: the restrictive, permissive and situational. The purpose of these zones is to limit and reduce the number of accesses along the Highway. The problem with the growth policy is there isn't any review, and an example of that is the Qwivels access point. MDOT is currently working with Fish and Wildlife to study the document within those restricted zones. The document will allow adding an access or changing an access with mitigation. Discussion followed regarding access points and approaches. Dwayne stated they are currently working on an MOU for County and State jurisdiction.

Dave stated in the past there are cases where a road has been State jurisdiction, while the County has jurisdiction of the easement. He suggested a traffic impact analysis be done by the developer. Commissioner Driscoll asked if there was something that would help the Board have control over situations like Dave had mentioned. Dwayne suggested land use planning in conjunction with infrastructure planning and then work out transportation plan. Discussion followed regarding comprehensive zoning. Dwayne suggested working with the Board in developing countywide zoning. The Board agreed.